THE RIGHT OF PRIVACY.

BY JOHN GILMER SPEED.

Now, when gossip has become a recognized trade in which large capital is invested and many men engaged, it is most proper that we should consider and determine how far incursions may be made into the private life of the men and women of this country. A supreme court judge in the State of New York, in a recent noted case, decided that when a man became an artist, engaged in literature, or offered himself as a candidate for office, he parted with his right of privacy. I do not believe that this judge was more than partly right, and I do not believe that gossip as a trade has any greater rights because it has become a trade. Moreover, I believe that the definite establishment of this right of privacy is at this time of the greatest possible moment; for, without such a right and the easy enforcement of it, civilization must deteriorate, and modesty and refinement be crushed by brutality and vulgar indecency.

What is the right of privacy? Judge Cooley, in his admirable work on Torts, calls it the "right to be let alone." The ancients of our American institutions included it in that declaration which expressed the pledge of their lives and honors to defend the inalienable rights of "life, liberty, and the *pursuit of happiness.*" As man comes into the world alone, goes out of it alone, and is alone accountable for his life, so may he be presumed to have by the law of his nature full right to live alone when, to what extent, and as long as he pleases. If he admit others to his society, if he share his thoughts with any, or work for the benefit of his fellow-man, he establishes no prescription against his privacy, and until the morality of his acts is duly and decently disputed, the modesty of good and common nature sets between him and the modern inquisition the protecting shield of

that knightly order whose motto has been aptly termed the eleventh commandment—"Mind your own business." That our laws do not afford complete and adequate protection of the right is neither argument against its validity nor objection that they should not be so adjusted as to accomplish that purpose.

Sir Henry Sumner Maine not long ago, in his Oxford lectures, called attention to the fact that law is a progressive science, and that new relations give rise to or develop new or inchoate rights, and a long line of cases in American and English courts gives proof that the application of remedies has from the very earliest time kept pace with the ever-shifting cunning of human aggression.

But has the right of privacy ever received recognition in the forum of administrative justice? We have rights of property, rights of life and bodily integrity. Do these enumerate all the personal rights? The laws of human community from long time recognized the inherent privilege of vindicating personal honor against slander and libel. The growth of this action, as such a proceeding is called in the law of English-speaking races, shows very clearly that by its very reason of existence that system provided for the possibility of modified relations and the invention of ingenious wrongs. Early in the application of common law the rigor of its rule was softened and the power of the remedy for wrong done with force and arms upon person and property was extended to injuries which were effected by trespass on the case. That was to say, if a man trespass, though he use not weapons in the doing of it nor apply physical force, yet shall the injured one have an equal right to damages, if any measure thereof can be found, with him whose person or property suffers actual wounding. By a similar reason the assault or attempt was made commensurate with the actual striking or battery, as a man would be damaged if he were obliged to put up his defence to ward off overtly threatened blows.

The doing of many acts to the injury of a person or of his property, which came not fully within the notion of violence, was included in the term "nuisance," and so had more or less effective remedy in judgment of damages. It was found that the healthy and common-sense rule that a man must so use his own as not to injure the goods or person of his neighbor was a very good one to follow in dealing out the rugged justice of our tribal

ancestors. Even the loss of services of wife, husband, or children became by a kind of uncouth courtesy a reason for the recovery of damages, which were often assessed at a figure expressly punitive of the wrong-doer in the killing, maiming, seducing, abducting, or grievously injuring of one or other of these relatives.

As the simple seagirt people of the western islands began to extend the scope of their operations beyond seas, it soon became certain that other rights existed, against the infringement of which their common law ought to protect them. Trade secrets and marks began to be regarded as property, and the fruits of invention came in a like manner to the care of the law. With the increase of books by aid of movable types came the idea of copyright. So many and complex became the relations which an extended commerce and tremendously increased activity soon laid upon the English people, that first they were constrained to aid the force of their traditional law by statutory additions and enlargement, and then to engraft upon their procedure some of the best methods of the Roman or Imperial codes. This was very satisfactorily arranged by setting up the Lord Chancellor as the keeper of the sovereign's conscience, and through him obtaining from that ever-flowing fountain of justice such helps as the wisdom of the civil law afforded.

The exclusive right to multiply copies of written or printed books has been one of the most edifying results of the long discussion, and is a declaration that a man has full right to the exclusive ownership of his written thought by common law. A familiar example of the enforcement of this view is the inviolability of property in correspondence. The contents of a letter may not be published without the consent of the writer. Another instance less familiar but not less forcible is the integrity of property in plays retained in manuscript, which is preserved notwithstanding their never so frequent presentation to the public.

The law of France, which follows the rule of the Roman Code, has explicitly declared the right of privacy, and provided measures for its vindication in the statutes relative to the control of the public press. The Penal Code of France has, since May, 1868, declared that any publication in newspaper or periodical of facts relating to one's private life shall be punished as a criminal offence.

It must readily be seen from these instances that the law, not only of our own but of other races, stands ready to assert enforceable privileges entirely apart from those which affect property and bodily safety. With the instantaneous photograph, the untamable reporter, and the Röentgen ray prying busily into the daily affairs of men, it becomes more than ever a serious problem whether man can be made secure from impertinent curiosity and mischievous or malicious spying.

Ever since the middle of the last century, when the courts of England declared that the writer of a private letter was entitled to prevent the receiver from publishing the contents thereof (Pope *vs.* Curl, 1741), the application to the right of privacy of the rules of law and equity has engaged the most serious attention of judges on both sides of the Atlantic. As early as 1820 the English courts, as is evidenced by the case of Youatt *vs.* Winyard, and other judgments, following the rule there declared, enjoined the publication of secrets obtained in the course of confidential employment, and they have, within a few months past, most emphatically reasserted the rule. In the case of Prince Albert *vs.* Strange, 1849, the defendant was prevented from selling or describing in print certain etchings made by Queen Victoria and the Prince Consort, and in that case the judge redeclared the governing principle which forms one of the chiefest beauties of our common-law system—that its rules are "providentially expansive and capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce." The Lord Chancellor in the same case declared that the personal right invaded by the defendant was the right of privacy.

The right of heirs or children to protect the graves and monuments of their dead, asserted as long ago as the time of the learned Coke, and more recently exhaustively discussed in New York in the Beekman Street case (1854–1856), is established as sacred and inherent and independent of any considerations of property whatever. The exclusive use of one's own name was made the subject of recent decision in New York, when the late Sir Morell Mackenzie was allowed an injunction in 1891 against a certain Mineral Springs Company to prevent the use of his name and portrait, under the judicial declaration that their unauthorized use by the defendant was an injury to the physician.

Numerous cases have grown out of the unauthorized use of photography, and the right of privacy has been emphatically declared in cases where photographs have been either openly or surreptitiously obtained. In comparison to these cases there is afforded an excellent opportunity to note the difference between rights which are by nature inherent and those which arise from contract, actual or implied. In the English case of Pollard *vs.* Photographic Company, while the Court discussed at large the subject of the law of privacy, yet it appeared clearly that defendant's use of the plaintiff's portrait was a breach of an implied contract, for the photograph was made with the latter's consent and for private use. On the other hand, the recent American case of Manola *vs.* Stevens (1890) enjoined the use of a photograph of the plaintiff, an actress, taken without her consent by the use of the surreptitious flash light. This case, it is to be regretted, did not pass into the ranks of precedent, for the defendant submitted to the rule of the lower court. There would have been an excellent opportunity here to review the entire question of the right of privacy in its strictest construction, as the plaintiff was engaged in an occupation which devoted certain hours of her time to the portrayal of character before the public in drama. It would have been a nice point to distinguish between the voluntary relinquishment of so much of a person's right of privacy as must be laid aside by the actor when engaged in playing and the bestowal by that act of a general privilege to any and all to make and have pictures of the actor. It needs no citation from law or reason to establish the rule that the habit indulged in by so many actors of thrusting their portraits before the public, and filling the columns of daily newspapers with the most intimate as well as most trivial of their private affairs, does not take away from any member of the profession the right to be let alone when the curtain which hides his assumed character from the world is drawn close.

It is too bad, in fact, that in dealing with this vitally important subject of the enforcement of the right of privacy the ultimate courts have so often been, or seemed to be, obliged to decide the cases before them, in which this right was an important element, upon some point which left the larger subject unaffected by their judgment. It yet remains for some one to present a case in which a full and broad decision can be had. Two most

famous cases have been before the courts of late years in which all the essential matters affecting this important and inherent personal right were exhaustively studied and discussed by learned and eminent counsel and judges, and yet in each instance the court's decision was based upon some little fact which closed the door to authoritative precedent.

The well-known case of Schuyler *vs.* Curtis in New York engaged the attention of the courts and the public for a number of years, from 1891 until last December, when it was finally decided in the Court of Appeals at Albany. An effort had been made to secure a public subscription for the purpose of exhibiting a statue of Mrs. Mary M. Hamilton Schuyler, then deceased, at and during the World's Fair, Chicago, and afterwards in New York. The relatives of the deceased lady sought to prevent the act, and the means thereto, as invasions of the right of privacy. They represented the family of Mrs. Schuyler in the most direct heirship. The court in which suit was begun issued its order forbidding the proposed action. The preliminary order was twice continued upon reasons which Judge Morgan J. O'Brien at Chambers in the first, and Judges Van Brunt and Barrett at General Term in the second, instance held to have unequivocally established the right in the plaintiff to prevent intrusion upon the privacy of the memory of their kinswoman. Upon trial in November, 1892, that order was made permanent. In December, 1895, this judgment, the entire case having been exhaustively and carefully argued by able counsel upon both sides, was reversed by the Court of Appeals, in spite of an earnest, clear, and logical dissenting opinion by Judge John Clinton Gray, which he began with the words: "I most emphatically dissent from the decision of this court that there was no ground shown in this case for the equitable relief which was granted below. That a precisely analogous case may not have arisen heretofore, in which the peculiar power of a Court of Equity to grant relief by way of injunction has been exercised, furnishes no reason against the assumption of jurisdiction." The decision of the majority of the judges, delivered by Judge Peckham, proceeded upon the assumption as a principle that "whatever rights of privacy any individual may have died with him." Judge Peckham says: "Whatever right of privacy Mrs. Schuyler had died with her. . . . The right which survived, however extensive or limited,

was a right pertaining to the living only. . . . That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative. . . . A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased." The opinion then goes on to review the matters of fact in order to reach a conclusion that the supposed injury to plaintiff's feelings was merely fanciful, and, though it does not alter the words, that it was one of those trifles for which the law cares not. In regard to this, Judge Gray says: "However opinions may differ with respect to the substantial nature of the injury to the feelings of Mrs. Schuyler's relatives, we have the finding" (the settlement of fact by the trial court) "that it was in fact caused, and we should not say that it was merely fanciful."

And so in this case the opportunity of giving us a light upon the obscurity of the right of privacy was avoided.

The English judges were called upon to act in this matter about the same time that the case above mentioned was pending. Their decision, though not referred to in Schuyler *vs.* Curtis, was rendered in 1894. A homicide was committed upon an estate called Ardlamont in Scotland, for which a young man named Monson was arrested and tried. The circumstances of the affair, the social standing of the victim and the accused, and the difficulty of obtaining any adequate reason for the strange and sudden death, caused a widespread sensation. The occurrence became and still is known as "The Ardlamont Mystery." The Scotch jury returned a verdict, "Not proven." This proceeding, not tolerated in English or American law, left the defendant neither condemned nor vindicated, and consequently but enhanced the morbid and insatiable curiosity of the public. The Tussaud Company, Limited, of London, successor of the celebrated Madame Tussaud, conducting an exhibition of waxworks, prepared and caused to be publicly displayed at their establishment in London a gruesome imaginary representation of the tragedy in what is termed a "Chamber of Horrors." In connection with this plastic solution of "The Ardlamont Mystery," they exhibited a waxwork figure of Mr. Monson, not in the awful group in the

"Chamber of Horrors," but in gentlemanlike and dignified semblance, in an adjoining passage, through which the public was obliged to walk before or after witnessing the invented portrayal of the crime with which Mr. Monson had been accused. Mr. Monson sought to prevent this exhibition as a breach of his right of privacy, by appeal to the equity power of the English bench. The notoriety of the original cause of the litigation, as may well be imagined, drew to this case the most widespread attention. Even from far-away India there came expression of the hope that this at last would give chance for the settlement of the question of the right of personal privacy. Some of the most capable jurists of the bar were engaged in the argument and presentation of the case, and all the elements of the important right involved were most carefully and learnedly elucidated. But here again expectation was doomed. Some one found an "if" lurking in an unconsidered corner, and dragged it out to destroy the rigor of that powerful helper of the law, the equity branch. One Louis Tussaud, who bore some relation to the defendants and conducted a similar business, claimed that Monson had given him permission to produce and exhibit the portraiture in question, and that a consideration for the privilege had passed between them. The existence of this claim was enough to stay the hand of equity. "If" there had been such a contract, to believe which the Court seems to have had reason, equity could not assist Mr. Monson to relieve himself from the consequences of his own act.

Perhaps the most signal recognition of the right of privacy is the spirit which underlies our positively declared and strictly enforced rule of law that no priest, lawyer, or physician can be compelled to testify as to matters confided to him in his professional capacity by another. This is called the rule of confidential communication, and is not limited to merely voluntary information, but covers all knowledge of a person or his affairs obtained in consequence of the professional relation. To the students of English law, it will not be difficult to refer the first implanting of this sturdy timber in the soil of our jurisprudence to the devious and cunning methods employed by the prosecutors at the trial of the Jesuit priests accused of complicity in the Gunpowder Plot, in the year 1606, to force or betray them into violation of their sacred duty towards the inviolability of the confessional. It was for avoidance of the questions pushed upon them for this

unworthy purpose that they were stigmatized as "equivocators," and the name of their society set down with ineffectual solemnity in dictionaries of the English tongue as a synonym for that dubiously polite label for one of the seven degrees of the lie. We have not been so very many years free from the odium of this uncharitable wresting of the law to wrong-doing. In spite of the fact that the rebellion of the colonies set up a new order of English law upon the hither shores of the Atlantic, for the perpetual fosterage of freedom, it was found necessary, even under the liberal provisions of the Constitution and laws of the United States, to call the power of equity into the forum of conscience in order to protect a priest in his refusal to answer on the witness-stand about matters affecting his professional and confidential relations towards a person accused of crime. In this case the best minds of the New York bar were engaged in the task of establishing firmly and for all time the guaranty of this much of the sacred right of privacy. That assurance is now established beyond all cavil by the statute law of every state in the Union.

The celebrated English Chancellor Lord Eldon took occasion, while reviewing the case of Wyatt *vs.* Wilson (1820), to note as an analogy the supposed case: "If one of the late king's physicians had kept a diary of what he heard and saw, the Court" (of Equity) "would not, in the king's lifetime, have permitted him to print and publish it." While there is a hint in this reference to the unfortunate sovereign of the application of the rule forbidding the doing of things which are contrary to public policy, it is still true that in the case before the Chancellor the right of privacy was of such importance that he seems to have deemed it the foundation of the more familiar public safety. Why not? If the right of privacy exist, it belongs to all persons, artificial as well as natural. The state, in the workings of its diplomatic and police relations, in the regulation of its revenue, the councils of its lawmakers, and the deliberations of its juries, demands and is accorded the closest secrecy. Who dare intrude upon a meeting of cabinet ministers or publish their views without permission? Who ventures to betray the confidence of the secret service? Executive sessions of the legislative body are held with closed doors and should be remembered only with closed lips. The servants of justice, sworn to hear witnesses to disputed fact and weigh the value of their testimony, are not even themselves permitted to

disclose the privacy of the juryroom. Shame and contempt fall instantly upon the foolish violator of these public privacies—irrefutable proof that the reason lies in a law of humanity's nature. Nor does the same character of spontaneous proof fail in certain cases where private right to be let alone is grossly outraged. Only a little while ago the heart of the world trembled with detestation at the act of an English doctor—an act done in sheer and wanton outrage of the confidence of a patient. The grievance of this case was the betrayal to others by the defendant's physician of knowledge obtained by him in a professional relation towards the plaintiff, a married woman.

The illustrated journalism now prevalent finds its finest achievements in the publication of photographs surreptitiously taken. The value does not seem to lie in the fact that the photographs are of notabilities, but that they have been taken by stealth when the subjects were unconscious of the purpose of the person manipulating the camera. Indeed, it is a well-known fact that at least one of the newspapers of New York keeps a photographer busy in the streets of the metropolis taking "snap shots" at every person who appears to be of consequence. These are used at once, or filed away for use when occasion arises. Now, such practices are unquestionably invasions of the right of privacy; but we are told by the courts that the victims of such practices may not restrain by injunction the publication of photographs so taken, but that the remedy lies in a recovery for damages. This is no remedy at all, for the chances would be that some demagogue of a judge would declare that the hurt was but fanciful and too inappreciable for a merely earthly tribunal to estimate.

If, therefore, we cannot find, either among the cases which make up our rules of decision or upon the pages of the general laws, a positive declaration that all things which concern the private life, habits, acts, and relations of the citizen, and bear no necessary relation to his fitness for the public office toward which he is a candidate, or to his ability as a teacher, preacher, or professor in science or art, or any bearing upon acts done in any of these capacities, shall be subject to publication, in print or otherwise, only upon the consent of the person within whose right of privacy they lie, then the time has come when the legislatures must act so as to make the fundamental law as to these particular

rights of man operative and enforceable. Otherwise vulgarity will envelop the nation, and we will permanently deserve the reproach now put upon us by the nations of Europe—that in civilization we are on a par with the half-reclaimed Slavs of Russia, and only a trifle higher in the scale than the mongrels who live in perpetual revolution in Central and South America. The difficulty in the way is the fear that the liberty of the press may be restrained by any statute guarding the right of man's privacy. But the press never had any real right to invade proper privacy; so a law defining what privacy is and fixing a penalty for its invasion would not be any abridgment of the right of publication, for the right of improper publication never existed. Then again Americans as individuals must, if they think privacy worth preserving, abandon their disposition to suffer wrong rather than to take the trouble of being disagreeable. In other words, the individual citizen must cultivate to its highest development that confident moral courage which counts no sacrifice too great when made to enforce any atom of his rights.

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